

Soda in School

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Federal Trade Commission

Office of the Secretary

Room 159-H (Annex H)

600 Pennsylvania Avenue, NW

Washington, DC 20580

Re: Food Marketing to Kids Workshop-- Comment, Project No. P034519



I submit these comments to propose 9 specific rules relating to the sale and promotion of soda to a captive audience of schoolchildren on school property. The children are necessarily without parental supervision during the schoolday. Under these special circumstances, the Federal Trade Commission ("FTC") should scrutinize the marketing practices for reasonableness in regard to soda. The FTC has jurisdiction for the regulation under such circumstances as it did the promotion of 900 calls to minors. When parental supervision is prevented by reason of the children being required to come alone to school, marketing practices need to be restricted so as to not undermine parental values taught at home relating to healthfulness of beverages.

As an attorney, I have represented various parents, taxpayers and excluded competitors. I have brought administrative proceedings in New York State that seek to stop Coca-Cola's promotion of soda to schoolchildren. This past year I collected hundreds of school pouring rights agreements under the Freedom of Information Laws from all the 50 states. At <http://www.schoolpouringrights.com>, I have uploaded illustrative contract provisions and company presentations to school boards, dozens of photographs of toys and games used by Coca-Cola to "brand" children, and hundreds of media and scientific articles on the subject of soda in school.

But I submit these comments on my own behalf as the father of a five year old. I have raised her to think that "soda is bad for you." No soda company has the right during the school day when she is away from me to raise her or tell her any different, whether through its advertising, promotion, or marketing practices.

John Alm, president of Coca-Cola Enterprises, the huge Coke bottler, said:

"The school system is where you build brand loyalty."

A Push to Stay in School: A Target of Anti-Sugar Activists, CCE Defends Its Sales in Schools," Atlanta Journal Constitution, March 6, 2003

These are the nine changes that should be accomplished by rule relating to this "branding" of children in public schools:

- (1) The Signage On School Vending Machines Should Be Changed To Noncommercial Signage As Promised Over Four Years Ago As Part of The Public Relations Response;
- (2) No Promotional Activity Should Be Allowed On School Property, To Include Truckload Sales, "Pepsi Pep Rallies," or T-shirt Vending Sweepstakes Contests;
- (3) All "Approved Cup" Provisions Requiring Prominent Display of The Soda Company's Logo By A Child Should Be Removed From School Beverage Contracts;
- (4) Soda Manufacturers And Distributors Should Be Required To Stop The Practice Of Some Of Giving Expensive Tickets And Other Gifts To Athletic Events To Officials With Responsibility For Our Public Schools;
- (5) The Industry May Not Bind Future School Boards (Who Represent Parents) From Exercising Their Discretionary Authority To Go Soda-Free;
- (6) The Industry Must Comply With All Competitive Bidding Laws So That Companies Selling Only Heathful Beverages May Also Compete;
- (7) The Industry Must Withdraw Caffeinated Products From Public Schools As Sought By The United States In Federal Court Litigation Over 100 Years Ago;
- (8) Meters Should Be Installed On The Machines Showing Actual Sales So That Schools Are Not Having To Rely On Self-Reporting, In Light Of The Reported Documentary Evidence Of Fraud By Some In The Industry;
- (9) Toys And Games Bearing the Coca-Cola or Pepsi-Cola Logo (To Include The Dozens Pictured At www.schoolpouringrights.com Under "Photos"), Should Not Be Distributed To Children

My discussion of these points is being sent by overnight mail and is at <http://www.schoolpouringrights.com>

DISCUSSION

The largest school districts in the US already have gone soda free for all grade levels: New York City, Los Angeles, Chicago, Philadelphia, Las Vegas, San Francisco, Boston, Seattle, Austin, Buffalo, Scranton, Pittsburgh and many more. The leaders of these School Districts agree: Kids' health matters. Practice what you teach. Model good choices. The soda industry -- in Maine -- was accepting of a statewide K-12 ban that it is opposing so strongly in California.

As Newt Gingrich has said:

"we need very big public policy changes to stop diabetes and obesity from ruining our young people, including, I think, going back to having daily physical education in K through 12 and I think, frankly, taking all these soft drink machines out of the schools or requiring them to have drinks that are healthy and not have young kids getting filled up with sugar water in a way that is clearly helping lead to obesity." (on NPR's Tavis Smiley show, June 11, 2004)

Earlier last month in a week that saw proposed K-12 bans and restrictions such as proposed by Republican Governors Schwarzenegger and Huckabee, the industry had seemed poised to vote on standards that would be followed by its members. Clarifying a news report earlier this week, a spokesman for the American Beverage Association ("ABA") reported in the Washington Post that the ABA would not enforce any school nutrition policy and that it would just be a suggestion to its members.

Rules addressing the following issues are needed.

- (1) The Industry Should Change To Noncommercial Signage As Promised Over Four Years Ago.

This statement that the industry does not advertise soft drinks to kids is especially specious given that it overlooks the fact that the advertising panel inserts in schools throughout the country show a six-foot high picture of a can or bottle of soda on ice. That is high-impact point-of-sale advertising. It was four years ago that Coca-Cola made the announcement of the non-commercial signage available and yet throughout the country the six-foot high electronically backlit picture of a soda product still dominates. Yet, Ms. Rodgers, spokesperson for Coca-Cola in the public meeting on July 14, 2005 said "We are developing vend fronts that are not branded, that would be lifestyle-oriented or it would encourage physical activity and provide more nutrition education " Coca-Cola said the same thing in its public relations spin over four years ago. The failure to install the panel inserts demonstrates that self-regulation has not resulted in any meaningful change.

(2) No Promotional Activity Should Be Allowed On School Property, To Include Truckload Sales, Pepsi Pep Rallies, or T-shirt Vending Contests.

The Coca-Cola and Pepsi-Cola bottlers have entered contracts having truckload sales on school property (where students buy for resale and to take to their family), T-shirt giveaways, and the like. Logo-emblazoned premiums are the norm. Even recycling bins prominently display the soda company's logo. Some contracts provide for vending sweepstake promotions where instead of a soda you might get a T-shirt rolled up in a can, partnerships where students would get a share of commissions if they go out in their community and place vending machines, and even "Pepsi pep rallies." Such promotional activities constitute commercial speech under the First Amendment. Given that it is public property, under the First Amendment, a school district may not let one party engage in such speech while excluding others.

Good News Club v. Milford Central School, 533 U.S. 98 (2001)

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=99-2036>

In my experience with well over a dozen school districts, Pepsi Bottling Group and Coca-Cola Enterprises would only cease such activity and amend the contract at a particular school district after it was administratively challenged. Such activities have continued in other parts of the country -- such as the elementary school down south where elementary school teachers are given free shirts with the soda company name to wear on casual Friday.

(3) Coca-Cola Enterprises Should Be Required To Stop Its Practice Of Giving Expensive Tickets To Athletic Events And Other Gifts To Politicians And Other Officials

Soda companies marketing an unhealthful beverage to children should be required to stop the practice of giving expensive tickets and other gifts to officials.

NewsChannel 5 Investigates: Perks of Power, July 25, 2004 ("So how do you get all these tickets?" someone asks. ... Coca-Cola most of the time," Ford responds.)

<http://www.newschannel5.com/content/investigates/1136.asp?q=newschannel+5+investigates>

The practice dates back years to the launching and national promotion of the "pouring rights" scheme in public schools.

In 1998, the New York State Comptroller Carl McCall had concurrent jurisdiction over the legality of such agreements. Where was he during the national launch of these agreements here in my hometown of Syracuse, New York and its suburbs? He was in boxseats at the basketball game -- in seats comped by the Coca-Cola Enterprises Vice-President Robert Lanz. Mr. Lanz oversaw the launching of the agreements and, according to the press accounts, negotiated the North Syracuse agreement.

Joe Mahoney, "McCall's Letter Pile Keeps Growing," Daily News, October 5, 2002 ; Kenneth Lovett and Fredric U. Dicker, "Writer's Cramp," New York Post, October 5, 2002 (McCall at least twice accepted tickets to the Knicks for him and his wife from a top Coca-Cola official). See generally Steven M. Levin, "Illegal

Gratuities in American Politics: Learning Lessons from the Sun-Diamond Case," Loyola of Los Angeles Law Review, Vol. 33: 1813 (June 2000).

In the Spring of 1998, McCall's office was involved in an ongoing audit of pouring rights agreements in New York State -- finding, for example, that Generally Accepted Accounting Principles were not being followed at the State University at Stony Brook.

The Comptroller did not join the State Education Department in questioning these agreements at elementary, middle and high schools or require that they be competitively bid. He instead wrote a letter thanking the Coca-Cola Vice-President Robert Lanz for the hospitality shown him and his wife at a March 8, 1998 game between the Knicks and Bulls. That was the very month the agreement was being negotiated. When in the Fall 2002, the outrage was discovered and it was pointed out that gifts in excess of \$75 to a public official were illegal, his spokesman explained that he didn't think he needed to report the gift because he and the Coca-Cola Enterprises Vice-President were friends.

The senior official in launching these agreements, Coca-Cola Enterprises Vice-President Lanz, was also a good friend of powerful New York legislator Michael Bragman, who as majority leader held the purse strings over the New York State Education Department. The pair was pictured some years earlier coming out of a luxury hotel in Puerto Rico in a Syracuse Post-Standard article. Mr. Bragman, whose real estate attorney represented Coca-Cola Enterprises, angrily steamrolled the NYSED's legal objections.

Erik Kriss and Jon Craig, "Secrets of the Chamber: How the New York State Legislature Spends Your Money: Who Says There's No Such Thing As A Free Lunch," Syracuse Post-Standard, September 28, 1994

The Coca-Cola manager in charge of the agreements, William Wyrick ("Lucky") once said that whatever passed between Mr. Bragman and Mr. Lanz was out of friendship. According to a former Coca-Cola employee, regular deliveries of product were made to Mr. Bragman's home during the mid-1990s. According to a former employee, the Coca-Cola "Move Crew" would deliver items, including two vending machines, directly to his basement.

Someone should tell these public officials that the fact that they like the lobbyists who give them unreported gifts in excess of the statutory limit is irrelevant.

Why didn't the Coca-Cola Enterprises Vice-President Public Relations stop the practice of inviting legislators and government officials to elite sporting events after I pointed out to the CCE General Counsel that the practice needed to be stopped? (The Coca-Cola Enterprises General Counsel John Culhane assured me that CCE complied with the law. I was told by counsel for the New York State Lobby Commission that Coca-Cola, when called, said that it no longer was giving free tickets to expensive athletic events. But that proved not to be true. See, e.g., "Ethics Commission to take up Celtics Investigation," Associated Press, June 23, 2005 ; "Legislators Watch Celtics Game in Coca-Cola's Luxury Box," News Channel 10, March 11, 2005. The same Coca-Cola Enterprises Vice-President hosted.

Such gifts have become common enough that they are actively sought by some legislators and school officials, as illustrated by one transcript of a tape recording in which a principal sought tickets worth \$2,500. On the tape, she sought tickets to a second game so she could compare the two games.

Fullerton, "Purging and Courting," Austin Chronicle, April 27, 2001

http://www.austinchronicle.com/issues/dispatch/2001-04-27/pols_feature2.html

Fullerton, "Soda Jerks: Does the AISD Vending Machine Scandal Reveal a Web of Scoundrels -- or Just a Ship of Fools?," Austin Chronicle, April 27, 2001

http://www.austinchronicle.com/issues/dispatch/2001-04-27/pols_feature.html

Competitors have made formal allegations of such behavior in court relating to practice in the trade generally. Automatic Merchandiser, March 1999 (quoting court allegations). But whatever the trade practice

in private retail (the local bottler had a room the size of a warehouse for premiums) does not apply to public school property where kids are subject to such marketing, advertising, and promotional activities without parental supervision.

Do the members on the Council for School Partnership funded by Coca-Cola, including leaders from most of the major education organizations, really get \$6,000 a year as once had been reported in the Dallas Morning News?

"Fees to former Superintendent raises issue: Group financed by Coca-Cola Paid Moses \$6,000, Dallas Morning News, September 7, 2004

<http://64.233.161.104/search?q=cache:MI0EzGqjCvQJ:www.asu.edu/educ/epsl/CERU/Articles/CERU-0410-252-OWI.pdf+%22Dallas+M>

The FTC should enact a rule that prohibits financial relationship between food and beverage companies and public school officials. The industry has shown itself not be capable of effective self-regulation of its conduct and it remains business as usual.

When the Governor of Arkansas was given a \$500 canoe by the Coca-Cola bottler, did the bottler really think that it was an acceptable excuse that the company's only purpose was to get the free advertisement? The Governor continued to play a key role on soda in schools even after being fined by the state ethics commission. He initially had gutted the recommendations of his own Task Force, just as other decision-makers have done after lobbying, financial contributions or gifts by soda interests. The law may permit campaign contributions or large payments to former staffers turned lobbyists. But it does not permit gifts to public officials charged with safeguarding the health of schoolchildren.

"Arkansas governor fined \$250 for accepting gift from Coca-Cola," The Post and Courier (Associated Press), January 18, 2003

Do 100 Superintendents really get paid \$2,000 a year in connection with an all-expense paid weekend at a luxury resort by Coca-Cola and other industry vendors -- with the funds routed through sponsoring leadership group, as reported by the Dallas Morning News?

Scott Parks, "School Superintendents paid to hobnob with vendors," Dallas Morning News, July 23, 2004

Bruce Buchanan, "Grier Stops Accepting Free Trips," The News & Record, August 31, 2004

<http://64.233.161.104/search?q=cache:tTqpYr1kFAJ:www.asu.edu/educ/epsl/CERU/Articles/CERU-0410-250-OWI.pdf+%22Dallas+Morning+News%22++Coca-Cola++ERDI&hl=en&ie=UTF-8>

"Grier Wisely Retreats From Sticky Situation -- Conferences Where Vendors Buy Time With Superintendents Create The Appearance Of Impropriety," The News & Record, September 11, 2004. The 100 Superintendents and education officials are listed in the Dallas Morning News article. I spoke with the charismatic head of the leadership conference and he did not disagree with any of the factual allegations in the reporting by the Dallas Morning News.

Coca-Cola has a long tradition of gift giving to high officials. For example, according to the Atlanta Journal Constitution, in 1994, Coca-Cola paid \$1,200 to have Zel Miller, then Governor of Georgia, to listen to country music in Branson, Mo. Miller served as Chairman of Education Commission of the States. The next year, Coca-Cola paid \$500 to treat the State Agricultural Commissioner Tommy Irvin to four Dayton 500 tickets, that were reimbursed by Irvin only following a reporter's inquiry.

Source: Mark Sherman, "...Special access for officials 'bad idea', attorney general says." The Atlanta Journal Constitution, May 12, 1995, p. 1A. See also Rhonda Cook, "It's raining freebies," Atlanta Constitution, October 5, 1999, B3.

The Atlanta Journal Constitution once reported that each of Georgia's 12 congressional offices receives 40

to 50 cases of Coke products every month but the food gifts are not reported on their financial disclosure forms. Scott Shepart, "Georgia Legislators Given 40 to 50 cases of Coke Products Every Month," Atlanta Constitution, July 20, 1988 A2.

Coca-Cola reportedly has contributed toward expense-paid junkets to scientists studying the effects of sugar -- and even journalists covering the issue.

"UN Probes Industry Financing of Carbohydrate Report," Bloomberg, October 12, 2004.

<http://quote.bloomberg.com/apps/news?pid=10000085&sid=aPtezfXORvhU&refer=europe>

SOURCE: PR Week (sub. req'd.), September 22, 2004

<http://www.prwatch.org/spin/2004/9>

Coca-Cola has demonstrated how it regulates its conduct bearing on the health of schoolchildren when left to its own devices.

In short, if principles of good government were followed, the rule of law had been enforced from the start, there would be good nutrition in our schools today. The FTC should prohibit payments or gifts by any soda company to a government official relating to the sale of soda to children in school.

(4) The Soda Industry Must Stop Trying To Bind Future School Boards From Exercising Their Discretionary Authority To Go Soda-Free

A contract must never bind future boards or impair a future board's discretion. Each newly elected School Board has the right to make the discretionary policy decision on whether to sell unhealthy beverages to schoolchildren. Contracts should have a one year term, even where subject to renewal. There could never be "local control" under these long-term contracts -- such as is the mantra of the soda companies in opposing state regulation -- where the soda company is in effect preventing the exercise of the will of the local parents through long-term contracts. Many contracts have 10 and 12 year terms. In New York (and I presume in most states), any long-term contract that purports to bind the future discretionary authority of a future board is void and unenforceable.

The independent bottlers contract with the school districts -- not the syrup sellers whose representatives appeared at the July 14 and July 15 meeting. In administrative matters involving over a dozen districts, Coca-Cola Enterprises and Pepsi Bottling Group would only amend the contract if some party such as a parent or taxpayer were put to the burden of challenging the contract administratively. Parents in Albuquerque have a right to have milk sold in vending machines next year if they like. Action by the Federal Trade Commission is needed. When did parents ever cede the right to raise their kids to a soda company? Beware of strangers offering candy is what my mother taught me.

(5) The Industry Must Comply With All Competitive Bidding Laws So That Companies Selling Only Unhealthy Beverages May Also Compete

Beverages should be procured exclusively by sealed competitive bidding. It should be bid by product category and a company must not be required to sell soda in order to compete to sell healthy beverages on school property. If the beverages are sold by product category to the lowest bidder, small companies will be able to innovate healthy beverages to sell to schoolchildren. Favoritism, improvidence and corruption is rooted out by enforcement of the competitive bidding laws. Presently, only companies that sell soda are allowed to compete to sell beverages on school property which is a ridiculous situation -- and one orchestrated by Coca-Cola and Pepsi.

Under the distortion of the free market system that has been allowed to occur, the two largest companies don't have the incentive to innovate healthy beverages because of the monopolies that have been allowed on school property. The former head of innovation for Cadbury was very eloquent in his guest commentary "Aplomb of Enron."

Guest Commentary, Mike Weinstein, "Obesity and Beverages: 'Aplomb of Enron,'" Beverage Digest, February 6, 2004

<http://www.beverage-digest.com/editorial/040206.php>

Coca-Cola now is not even allowed to enter such exclusive agreements with private retailers in Europe and Russia.

Coke Settles with European Union over Sales Practices, BevNet, June 23, 2005

http://www.bevnet.com/news/2005/06-23-2005-coke_european%20union.asp

Paul Geitner, "E.U., Coca-Cola Antitrust Case Over: Soft Drink Giant Agrees to End Exclusivity Sales Practices, Washington Post, (Associated Press) October 20, 2004; Page E03

<http://www.washingtonpost.com/wp-dyn/articles/A46436-2004Oct19.html>

The phrase "This is America!" is coming to have an entirely different meaning to our children. They are being taught that monopolies are good. They are being taught by example that innovation to meet the public demand for healthful products and entrepreneurship is not something to be encouraged. One client, American Quality Beverages, regularly outbid Coca-Cola Enterprises and Pepsi-Cola Bottling Group in the category of enhanced sports drinks, a category that had only been developed because of AQB's innovations. According to a former Coca-Cola manager who helped launch the agreements, the "pouring rights scheme" was brought to public schools precisely to snuff out such competition.

Such an exclusive distribution agreement is per se unlawful under the antitrust laws where, for example, it separately runs afoul of First Amendment principles of commercial speech established by the United States Supreme Court.

Under the First Amendment, it is unconstitutional to prohibit a group from engaging in protected First Amendment expression after school hours where another group is allowed. Good News Club v. Milford Central School, 533 U.S. 98 (2001) Under the state constitution, before a license to use school property is granted, there must be a full and fair opportunity to be compete. Companies that sell healthful beverages -- and not soda -- must be allowed to compete and cannot be excluded consistent with the First Amendment.

In many states, the State Constitution prohibits the gift or loan of public property to a private commercial enterprise absent a valid and substantial school purpose. In such a state, a contract is unconstitutional where it is for nonschool purposes, notwithstanding a financial benefit. Summer soccer leagues and community groups using school property for nonschool purposes cannot be required to buy from a particular company. A Brownie Troop or summer soccer league or other group using school property for nonschool purposes has a constitutional right (under state constitutions) to go to the grocery store and buy healthy beverages from a company that only makes products conducive to healthful living. The same result follows under commercial speech principles under the First Amendment of the United States Constitution. If one company is allowed to promote its products to a summer soccer league on public school property, others must be allowed also. Good News Club v. Milford Central School, 533 U.S. 98 (2001)

Arun K. Jain, marketing professor at the University of Buffalo, has commented:

"For many years we criticized the Soviet Union for not providing free choices, and here our own educational institutions are falling into the same trap.

This country has achieved enormous growth and economic success because of competition in the free marketplace. By giving exclusive contracts that eliminate competition, we're selling the soul of the American way of life.

Is this what we want to teach our children?"

In Russia, last week, in response to litigation, Coca-Cola agreed that all of its contracts with private retailers would be non-exclusive upon litigation by the Federal Anti-Monopoly authority there. The European Union reached the same result in a ruling involving Coca-Cola this year. It is ironic that it is in America that the federal and state government has allowed the principles of free competition to be trammelled, where innovation is the most important -- the health of our children.

Lisa Bose McDermott, "RC Wins Battle Against Coca-Cola -- \$14.6 million antitrust marketing verdict for marketing practices," Texarkana Gazette, July 28, 2003

<http://www.texarkanagazette.com/articles/2003/07/28/news/news03.txt>

FoxNews' Bill O'Reilly is right in raging against these school soda contracts -- it violates freedom of choice to tell some user of school property for community purposes that she has to buy from a particular company. And it is unfair to be promoting an unhealthy product to a captive audience of schoolchildren. Governor Schwarzenegger is to be commended for showing international leadership on the issue -- but O'Reilly actually was making the same points a couple years ago.

(6) All "Approved Cup" Provisions Requiring Prominent Display of The Soda Company's Logo By A Child Should Be Removed From School Beverage Contracts

These contracts commonly have an "Approved Cup" provision requiring that, at events, only cups prominently displaying the soda companies logo can be used. Kids can't be made to serve as mobile billboards advertising a soda company's logo. Children should never be forced to carry the banner of one of the soda companies in the cola wars. Remember that US Supreme Court "Live Free or Die" license plate slogan case?

Wooley v. Maynard, 430 U.S. 705 (1977)

<http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=volpage&court=us&vol=430&page=715>

In the same way, an "Approved Cup" provision violates the rule against compelling speech. The logo constitutes "commercial speech" and it is unlawful to compel commercial speech. The soda companies would agree to drop when challenged administratively, but then left the provisions in contracts elsewhere in the nation, again illustrating the ineffectiveness of self-regulation.

(7) The Industry Should Withdraw Caffeinated Products From Public Schools As Sought By The United States In Litigation Over 100 Years Ago

The peer-reviewed literature is rife with evidence that children should not be given caffeine. See, e.g., Goldstein A, Wallace ME. "Caffeine dependence in school children?" *Exp Clin Psychopharmacol.* 1997;5:388-392; Bernstein GA, Carroll ME, Dean NW, Crosby RD, Perwien AR, Benowitz NL. "Caffeine withdrawal in normal school-age children." *J Am Acad Child Adolesc Psychiatry.* 1998;37:858-865; Pollak CP, Bright D., "Caffeine consumption and weekly sleep patterns in US seventh-, eighth-, and ninth-graders," *Pediatrics.* 2003 Jan;111(1):42-6; Paton C, Beer D. "Caffeine: The forgotten variable. *International Journal of Psychiatry in Clinical Practice*" 5(4): 231-236, 2001); Rockett IRH; Putnam SL. "Caffeine 'addiction' in high school youth: Evidence of an adverse health relationship." *Addiction Research & Theory* 10(1): 31-42, 2002; "A sip into dangerous territory," *Monitor on Psychology*, 32.5, June 2001.

Indeed, the ongoing and unfolding controversy over the soda industry promoting caffeine to kids is not new. It is unfinished business. The United States government sued Coca-Cola for the marketing caffeinated sugar water to kids in 1911. U.S. v. Forty Barrels and Twenty Kegs of Coca-Cola, 241 U.S. 265 (1916); Coca-Cola Co. v. Koke Co. of America, 254 U.S. 143 (1920) ("faint aureole of poison") Coke's inventor used citrate caffeine for its stimulant physiological effects. He marketed Coca-Cola as a "brain tonic."

In "For God, Country and Coca-Cola: The Definitive History Of The Great American Soft Drink And The

Company That Makes It" (Basic Books, 2000) is a prodigious account that was very well-reviewed by the Wall Street Journal, Washington Post, and New York Times Book Review. In that history, business journalist Mark Pendergrast described the suit brought at the urging of Harvey Wiley, who was known as the father of the Food and Drug Act of 1906:

"His anguished memos make it clear that his main concern was that children drank Coca-Cola. In May, he tried again, writing that a woman on a local board had objected to Coca-Cola signs erected near schools, luring students to imbibe. 'If their parents knew they were drinking caffeine,' Wiley asserted, 'they would be horrified.'... This time, James Wilson, the Secretary of Agriculture, personally told Wiley to lay off Coca-Cola. Wiley was 'surprised and grieved,' he wrote later, but 'as usual I could see behind it the manipulation of powerful hands.'

"In August of 1909, John Candler could still boast that 'not once... has there been a single State or Federal prosecution against ... Coca-Cola.' But two months later, that all changed. .. The case was officially called The United States vs. Forty Barrels and Twenty Kegs of Coca-Cola.... "

"From opening day on March 13, 1911, the Barrels and Kegs trial attracted national attention.

"Coca-Cola eventually won the case, though not on any scientific grounds. All the testimony and spying on jurors proved irrelevant...."

"The most compelling case against the drink in the trial had been its consumption by children. Defense lawyers hadn't contested caffeine's bad effects on youngsters; instead, they had denied that children drank Coca-Cola at all. This assertion was somewhat awkward, since many contemporary ads showed children drinking right along with their parents. "Father likes it. Son likes it," crowed one 1907 ad which depicted a five-year old happily imbibing. After 1911, an unwritten law stated that no one under twelve years old would be shown drinking in a Coca-Cola ad -- a dictum enforced under 1986."

"Because of adverse publicity from the trial, two bills were introduced to the U.S House in 1912 to amend the Pure Food and Drugs Act, adding caffeine to the list of 'habit-forming' and 'deleterious' substances which must be listed on the label. Coca-Cola successfully fought to kill the bills, the first of many such efforts to keep its caffeine content out of the public eye."

"In the final event, the case was settled out of court on November 12, 1917. Coca-Cola consented to a plea of 'no contest,' allowing the government a technical victory. ..."

"Wiley was no longer at the Bureau to push the issue, eight years after the initial seizure. In later years, however, Howard Candler implied that a federal attorney had accepted a bribe in return for the settlement. .. As [Coca-Cola counsel] Harold Hirsch later wrote, 'It was a serious litigation and involved the possibility of the entire destruction of the company's business. In essence, Hirsch had won a major victory: Coca-Cola had survived.'" (pp. 117-124)

Another prodigious and well-researched account is titled Secret Formula, by Frederick Allen. See also Benjamin LT Jr, Rogers AM, Rosenbaum A., "Coca-Cola, caffeine, and mental deficiency: Harry Hollingworth and the Chattanooga trial of 1911," J Hist Behav Sci. 1991 Jan;27(1):42-55. H.W. Wiley, "Soft Drinks and Dope," Good Housekeeping 55 (1912): 244; H.W. Wiley, "The Coca-Cola Controversy," Good Housekeeping 55 (1912): 392

I obtained the 4000 page excerpt from the Federal Records Center in Atlanta, Ga. The first 1000 pages consists of the testimony of numerous distinguished academics from the time explaining that children should not be given caffeine in soda. Caffeine is added (in a powdered form) because it is habit-forming, not for considerations of taste. "Controlled studies show that consumers cannot tell the difference between caffeinated and uncaffeinated based on taste." Griffiths RR, Vernotica EM, Is Caffeine a flavoring Agent in Cola Soft Drinks? 9 Arch Family Medicine 727 (2000)

Each month there are numerous examples based on first-hand experience -- where kids explain that they have become hooked on the caffeine and can't make it through their day without their soda. See, e.g.,

"Caffeine Intake Worries Experts," Keenebec Journal, July 30, 2005; "Halls abuzz (with caffeinated kids)," Portland Press Herald, January 12, 2004; "Caffeinated Kids," Consumer Reports, July 2003; Michael Stroh, Caffeine addiction is a growing problem, The Baltimore Sun, January 2, 2003; Julia Watson, "Food: Good school meals can calm students," Washington Times, May 24, 2005; Paula Moyer, "APA: First Graders' Behavior Problems Linked to Caffeinated Cola," MedPage Today, May 23, 2005; Ross Whiteford, "Caffeine - are you addicted?," greatreporter.com, March 29, 2005; Marissa McCarthy, "I'm an addict ... Are you?" Mywesttexas.com, March 15, 2005; Deb Cleworth, "Soda withdrawal rough, doctor says," Stevens Point Journal, Jan. 23, 2005; Bob Guinn, "Caffeine in soda and other beverages," Carolina Morning News, December 24, 2004; "Study Says Caffeine In Colas To Hook Drinkers," The Cincinnati Post, August 15, 2000; Paul Grindrod, "Board is Pushing Addictive Drug," Capital Times (Madison, WI), August 19, 1997 ; Lauren Gong, "Diet Coke Addicts" Stanford Daily, October 7, 2004; MH, "Caffeine: the next nicotine? Mother Jones.com, August 8, 2000.

Caffeine is a drug. It is a physical stimulant. Whatever happened to "just say no" to drugs in our schools?

(8) Meters Should Be Installed On The Machines Showing Actual Sales So That Schools Are Not Having To Rely On Self-Reporting

A transcript of a tape recording in which a local distributor says he cuts what he reports to schools by 50% is found at

Fullerton, "Purging and Courting," Austin Chronicle, April 27, 2001

http://www.austinchronicle.com/issues/dispatch/2001-04-27/pols_feature2.html

The industry should be required to install meters on the vending machines in schools to guard against temptation by distributors operating at the local level. Trust but verify.

(9) Toys And Games Bearing the Coca-Cola or Pepsi Logo (To Include The Dozens Pictured At www.schoolpouringrights.com Under "Photos"), Should Not Be Distributed

Two words -- Harry Potter -- should be enough to prevent a spell being cast by Coca-Cola's blandishments at the July 14 meeting about not advertising to children. Alternatively, just take a look at the dozens of photos of products recently sold with the Coca-Cola logo on it to children -- under "photos" at <http://www.schoolpouringrights.com>

A further example was the website of the Chairman of industry's trade association, Ralph Crowley of the American Beverage Association, until it was recently revised (to the company's credit). Last December, Mr. Crowley, also head of Polar Beverages, wrote an OpEd piece to the Boston Globe assuring us soda is not making kids fat -- he argued that they just need to exercise more. ("From foes of soft drinks, an empty case", Boston Globe, Dec. 28)

I was startled to go and find that the Polar Beverage website marketed and made their pitch for Polar flavored sodas directly to kids with unrestrained gusto.

"Each cub has their own favorite Polar flavor.... Skateboard Cub thinks Polar Grape is totally the best!"

"CUB MADLIBS! TRY THEM ALL!"

"Send a picture of YOU sipping your favorite Polar flavor with your friends at school! ... Or you can make a Polar pyramid with your Polar cans and have mom snap a photo!"

"Winner will be chosen every month and will receive a FREE case of your favorite Polar soda!..."

The webpage exclaimed that "Kids can't get enough of Orson!" (the company mascot)

Or, if they like, the kids can do some CUB COLORING.

"Print out your favorite picture and color!"

This was long after these issues had come to the forefront of public discussion. The fact that Chairman of the ABA had not yet taken to heart that his company should not be marketing soda to our kids, speaks volumes as to the industry's priorities just a few months ago. We should accept that it is the emphatic publicly stated view by Coca-Cola Enterprises President and CEO John Alm -- long after these issues had arisen -- that "The school system is where you build brand loyalty."

CONCLUSION

My mother taught me that anyone not part of the solution is part of the problem. The FTC needs to act in these concrete ways to ensure that parental supervision is not undermined. There is a captive audience of kids at school during the school day without parental supervision who are being targeted for marketing on public school property in violation of basic First Amendment principles established by the United States Supreme Court. FTC's jurisdiction is analogous to the justification of rulemaking relating to 900 numbers to children.

My mother once explained to me the 4 R's -- readin', ritin', rithmetic, and responsibility. Both schools and the FTC need to demonstrate to kids what it means to live up to their responsibility.

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